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In The
Supreme Court of the United States

BOY SCOUTS OF AMERICA AND CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

— v. —

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE, INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Petitioners Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America ("Petitioners" or "Boy Scouts") and Respondents Nancy Wyman, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, Carol Carney, in her capacity as Chair of the Connecticut State Employee Campaign Committee, and Margaret Diachenko, Richard Emonds, Paluel Flagg, Christine Fortunato, Burton Gold, Carol Guiliano, Carol Hamilton, Marilyn Kaika, Joan Kelly-Coyle, D'Ann Mazzocca, Bernard McLoughlin, Michael Nichols, William Phillie, Cheryl Swain, and Noel Thomas, in their capacities as members of the Connecticut State Employee Campaign Committee (collectively the "Respondents") have each consented to the filing of this amicus curiae brief[1] by the Individual Rights Foundation ("IRF").

The IRF was founded in 1993 and is dedicated to supporting litigation involving civil rights and First Amendment issues and educating the public about the importance of the First Amendment's free speech and associational guarantees. To further its goals, the IRF participates in seminars and other public events, contributes to newsletters, appears in litigation by its general counsel, Manuel S. Klausner, and files amicus curiae

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[1] Counsel of record, Paul A. Hoffman, authored this amicus curiae brief in its entirety, with the assistance of Manuel S. Klausner. No person or entity, outside of amicus curiae, Individual Rights Foundation, its members or its counsel of record, has made a monetary contribution to the preparation or submission of the present amicus curiae brief. The joint written consents of Petitioners and Respondents have been filed with the Clerk of the Court.

briefs in appellate cases involving First Amendment speech and associational rights issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public expression because such attempts pose a serious threat both to cultural diversity and to our free form of government.

STATEMENT OF THE CASE

This amicus adopts the Statement of the Case set forth in the Petition for a Writ of Certiorari ("Petition") by Boy Scouts.[2]

SUMMARY OF ARGUMENT

Your amicus respectfully submits that several constitutional errors by the Second Circuit demand this Court's review in order to avoid serious erosion of the freedoms of speech and expressive association:

(1) The Second Circuit's decision in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) fundamentally misapprehends and erodes this Court's opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), by erroneously concluding that regulation of the Boy Scouts' leadership role modeling policies is mere conduct which

[2] Numbers preceded by "A." refer to pages in the record before the Court of Appeals for the Second Circuit; numbers preceded by "P." refer to the Petition for a Writ of Certiorari; numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition.

raises lesser First Amendment protection. Thus, *Wyman* erodes *Dale* by denigrating the importance of *expressive role modeling activities as core First Amendment activity* intended to convey messages and values no less vital to Boy Scouts' purposes than its other forms of speech.

(2) The exclusion of Boy Scouts from the Campaign was viewpoint discriminatory and *directly targeted Boy Scouts' expressive association rights* because: (a) homosexual advocacy groups and other groups taking positions on moral issues were permitted to participate without restriction; (b) Boy Scouts showed evidence that they have a reasonable non-discrimination policy, which accepts homosexuals applying for positions not involving transmission of values to youth and excludes homosexuals only from positions where their presence would interfere with the transmission of values; and (c) Connecticut's Gay Rights Law, which was used as a measuring rod to determine what groups could participate in the Campaign forum, was *unconstitutionally interpreted to protect only some viewpoints*, namely those of individuals and "organizations devoted to sexual activities," while excluding the Scouts' role model policy as a viewpoint.

(3) Contrary to this Court's precedents, the Second Circuit in *Wyman* has improperly *constructed a lower-tier First Amendment standard of review* – called viewpoint disparity – contrary to this Court's precedents regarding stricter standards for determining viewpoint discrimination.

ARGUMENT

I. THE SECOND CIRCUIT DECISION IN *WYMAN* ERODES FUNDAMENTAL EXPRESSIVE ASSOCIATION RIGHTS ESTABLISHED BY THIS COURT'S PRIOR CASES BECAUSE IT FAILS TO RECOGNIZE THE IMPORTANCE OF BOY SCOUTS' LEADERSHIP ROLE MODELING POLICIES AS CORE FIRST AMENDMENT EXPRESSIVE ACTIVITY.

The Petition raises an important First Amendment issue on a recently decided case by this Court, i.e., whether the Second Circuit's ruling in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) erodes the effect of this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which recognized Boy Scouts as a primarily expressive association whose Scout leader *role modeling activities constitute core First Amendment activity* expressly intended to convey messages and values important to the association.

Throughout its opinion in *Wyman*, the Second Circuit fails to recognize the core First Amendment expressive activities being undertaken by Boy Scouts' role modeling – implying that, because such expression is transmitted through its membership and employment policies, therefore, it is relegated to some lower-tier form of First Amendment protection. *Wyman*, *supra*, 335 F.3d at 93. Since the exclusion of Boy Scouts from the Campaign is a mere regulation of "membership and employment policies as conduct, not as expression" (*id.*), it is not deserving of the same level of First Amendment scrutiny and the state may "to some extent restrict the message." *Id.* Thus, according to the Second Circuit, Boy Scouts' role modeling activities constitute mere "conduct toward homosexuals"

not deserving of the same protection as First Amendment "views on homosexuality." *Id.* at 98. However, the foregoing conclusions run directly counter to this Court's holdings in *Dale* and other expressive conduct cases.

In *Dale*, this Court rejected the simplistic conduct/speech dichotomy suggested by the Second Circuit in *Wyman* and clearly recognized the inherent transmission of moral teachings and values through, and the important expressive nature of, role modeling.[3] This Court found in *Dale* that "the general mission of the Boy Scouts" is to "instill values" and that Scout leaders do this "both expressly and *by example*." 530 U.S. at 649-50 (emphasis added). "Dale's *presence* in the Boy Scouts would, at the very least, force the organization to *send a message* both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653 (emphasis added). This Court further stated:

> "The *presence of an avowed homosexual* and gay rights activist in an assistant scoutmaster's uniform *sends a distinctly different message* from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment *right to choose to send one message but not the other*." *Id.* at 655-56 (emphasis added).

Since the Boy Scouts' form of expressive role modeling can only be achieved *through* its membership and employment policies, the Second Circuit's failure to recognize

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[3] This Court also recognized role modeling as an important method of transmitting teachings and values in *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

the exercise of core First Amendment rights in *Wyman* leads to a direct infringement and restriction of the Boy Scouts' and other groups' expressive role modeling rights, thereby relegating the right of expressive association to the status a lower-tier right under the First Amendment.

Such infringement, if unchecked, could drastically affect the rights of many expressive associations. For example, expressive activity by such groups as the Salvation Army, Girl Scouts, or Young Women's Christian Association may include appointment of leaders and youth counselors, who often teach more *by their example* than by their teaching. Such forms of expression should not be denied equal access to a forum simply because that form of expression arises out of such association's membership and employment policies.

"Governmental restraint on [speech] need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). By limiting the manner in which the membership and employment policies of expressive associations can be exercised, the Second Circuit has improperly attempted to create new limitations under the First Amendment. Such limitations would allow the government, by means of new and expansive interpretations of nondiscrimination laws beyond their original intent, to restrict expressive conduct to orthodox viewpoints. *Texas v. Johnson*, 491 U.S. 397, 418 (1989). However, notwithstanding the well-intentioned purpose behind Connecticut's Gay Rights Law, even the state's interest in preventing discrimination may be questioned "in the marketplace of ideas" and cannot be used to override the supremacy of the First Amendment. *Id.*

Accordingly, this case raises serious issues of state-mandated censorship precisely because of the Boy Scouts' mode of communicating traditional values regarding what is "morally straight" through expressive role modeling. It is a "bedrock principle" of the First Amendment that the government may not regulate expression of an idea "simply because society finds the idea itself offensive or disagreeable." *Id.* at 414. Moreover, First Amendment restrictions on government regulations are "*not dependent on the particular mode in which one chooses to express an idea.*" *Id.* at 416 (emphasis added). Accordingly, the government may not "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417.

As this Court held in *Dale*, the role of a Scout leader is clearly symbolic in large measure. Boy Scouts seek to control the symbolic messages they send to youth and the public through their unique emphasis on Scout leader role modeling.

Hence, the Second Circuit's failure to recognize the symbolic and expressive nature of Boy Scouts' role modeling results in a state regulation that *limits both the number and type of messages that can be conveyed in its forum* and amounts to a limitation on speech. "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Texas v. Johnson*, *supra*, 491 U.S. at 417. Thus, when the state seeks, as in this case, to *deny access to a forum only to certain speakers* whose "discriminatory" viewpoints are conveyed through the "medium" of their leadership role modeling policies and not to other speakers whose leadership policies are in line with the state's

viewpoints, there is a great danger of state-mandated censorship.

Moreover, it is precisely in the area of governmental overregulation of expressive conduct that the danger of ideological constraint is high, especially if the nexus between the expressive nature of the activity and the interest being regulated is not well understood. Since Boy Scouts seek to teach their messages and values *by quiet role modeling* and not by boisterous debate, there is a great danger that outsiders (including the state) may misinterpret such a position as mere conduct, as the Second Circuit has done in this case, not core First Amendment expression. However, as explained in *Dale*, this does not mean that such quiet advocacy is not fully worthy of protection under the First Amendment.

Therefore, the Second Circuit's failure to recognize Boy Scouts' expressive association rights, including expressive role modeling, as core First Amendment rights like oral speech, results in viewpoint discrimination. If left intact, *Wyman* threatens to substantially erode and chill the expressive association rights enunciated in *Dale*.

II. THE EXCLUSION OF THE BOY SCOUTS FROM THE CHARITABLE CAMPAIGN WAS VIEWPOINT DISCRIMINATORY BECAUSE SOME VIEWPOINTS REGARDING SEXUAL ORIENTATION WERE ALLOWED IN THE FORUM BUT THE COMMITTEE REFUSED TO PERMIT BOY SCOUTS' VIEWPOINT EXPRESSING A "PREFERENCE FOR HETEROSEXUALITY".

Connecticut's Gay Rights Law purports to protect all varieties of "sexual orientation," including those groups

"having a preference for heterosexuality . . . [or] having a history of such preference or being identified with such preference." Conn. Gen. Stat. § 46a-81a. In *Wyman*, *supra*, Boy Scouts claimed that the foregoing definition of "sexual orientation" protected their participation in the Campaign from viewpoint discrimination because of Boy Scouts' "preference for heterosexuality." 335 F.3d at 98-99. However, both the Committee and the Second Circuit dismissed this claim, concluding that the protection of Connecticut's Gay Rights Law applies only to natural persons and any "organization devoted to sexual activities." *Id.* at 99.

Thus, according to the narrow interpretation employed in *Wyman*, Connecticut's Gay Rights Law, a statute of general application, protects from discrimination only the expressions of individuals and groups "devoted to sexual activities," not groups taking a more traditonal, quiet, role-modeling approach to their sexual orientation.[4] *When such a narrow statutory interpretation is then used as a measuring rod to determine what groups are entitled*

[4] The Second Circuit attempted to justify its narrow interpretation of "sexual orientation" discrimination in *Wyman* by explaining that, if Boy Scouts can claim protection for its "preference for heterosexuality" under the definition section of the Connecticut Gay Rights Law, then any discriminatory organization could do so. *Wyman*, 335 F.3d at 99. However, this argument ignores the fact that Boy Scouts is an expressive association with an established viewpoint and a unique history of expression on this matter, as this Court held in *Dale*, a showing of proof which commercial entities are unable to meet. Thus, by failing to recognize Boy Scouts' expressive association rights in the interpretation of the phrase "preference for heterosexuality," the Committee and the courts below have chosen to construe the Gay Rights Law in a manner which runs afoul of the First Amendment.

to the benefits of participating in a forum, such as the Campaign in this case, *constitutional issues are clearly raised*. Therefore, the Petition squarely raises the issue of whether a Connecticut law of general application may be constitutionally applied to exclude the Boy Scouts from the benefits of the Campaign on the basis of viewpoint.

State refusal to recognize the First Amendment viewpoints of groups engaging in quiet advocacy, or even non-advocacy, is not new. This Court has reversed lower court rulings failing to recognize that even groups not having a coherent message or membership are entitled to protection of their "official" viewpoint. *See, e.g., Dale, supra*, 530 U.S. at 655-56 ("fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection"); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (purpose of St. Patrick's Day parade was not to espouse any views about sexual orientation, but parade organizers still had First Amendment rights worthy of protection). Thus, the danger of viewpoint discrimination is only heightened where a "viewpoint" is quiet, somewhat neutral, or not well-recognized.

In assessing whether a non-public forum such as a government-run charitable campaign is being administered in a viewpoint discriminatory fashion, the First Amendment will not tolerate a government regulation which "is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

This Court has found viewpoint discrimination where expression regarding a given subject matter is allowed in a

forum, but the refusal to participate in the forum extends only to those expressions communicating a disfavored viewpoint, such as speech having "a religious perspective" on an otherwise forum-permissible subject matter, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or a request for funding by an otherwise qualified student publication solely because of its religious perspective in a university forum purporting to fund a wide diversity of publications, *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995), or instruction in character and morals "from a religious viewpoint" in a limited public forum otherwise permitting instruction in character and morals. *Good News Club v. Milford Central School*, 533 U.S. 98, 109 (2001).

In the present case, the record below as well as the Second Circuit's opinion make clear that Boy Scouts has been *selected for disfavored treatment based solely on the exercise of its expressive leadership policy and viewpoint* regarding "sexual orientation" and "morals." First, the record clearly shows that the Committee allows unfettered participation in the Campaign by *pro-homosexual* advocacy and support groups, such as the Hartford Gay and Lesbian Health Collective; the Stonewall Foundation; Parents, Families and Friends of Lesbians and Gays; and Lambda Legal Defense and Education Fund. (A. 27, A. 548, A. 567, A. 672, A. 709, and A. 1030.) Other organizations expressing "moral viewpoints" were also allowed to participate in the Campaign, including Catholics for a Free Choice (A. 546, A. 669) and Girl Scout Council of Southwestern Connecticut, Inc. (A. 683, A. 687, A. 704.) Thus, expression of viewpoints regarding "sexual orientation" and "morals" is clearly an included subject matter in the Campaign forum.

Second, notwithstanding such unhindered participation by pro-homosexual advocacy groups and other groups expressing viewpoints on "moral issues," the Second Circuit concedes in *Wyman* that the decision to exclude the Boy Scouts from the Campaign was *based in part on the Boy Scouts' exercise of its constitutional right* to engage in role modeling by excluding gay activists from leadership positions, notwithstanding that such expression is "constitutionally protected." 335 F.3d at 91.

Third, Boy Scouts showed the Committee evidence that its non-discrimination policy denies positions to avowed homosexuals ***only*** for positions involving transmission of values to youth, but expressly allows known or avowed homosexuals to be employed in positions not involving transmission of values to youth. *Id.* at 85. Thus, the Boy Scouts' *non-discrimination policy is no broader than the constitutionally-upheld standards* for expressive association in *Dale*. Therefore, the Committee's exclusion of Boy Scouts from the benefits of the forum *directly targeted* expressive association rights.

Fourth, the Second Circuit's unnecessarily narrow construction of the Gay Rights Law as protecting only the expressive activities of individuals and groups "devoted to sexual activities" (*id.* at 99), and not the expressive activities of quiet advocates like the Boy Scouts whose "sexual orientation" viewpoint involves a "preference for heterosexuality," further suggests a blatantly viewpoint discriminatory application of the Gay Rights Law by the Committee.[5]

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[5] Other facts suggesting that the Committee's decision was not viewpoint neutral include: (1) Boy Scouts' unrestricted participation in

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Finally, the Second Circuit concedes that exclusion of Boy Scouts from the Campaign has an "adverse impact" on "attempts to *voice* anti-homosexual viewpoints through the medium of expressive association" (*id.* at 93), that such regulation will admittedly, to some degree, *"restrict the message"*(*id.*), and that Boy Scouts *"pays a price* for doing so." *Id.* at 95 n.8. (Emphasis added.)

Under this Court's relevant jurisprudence, such *extraction of a price* for expression of a viewpoint on an otherwise allowed subject matter within the forum *clearly violates the First Amendment*. "[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, *supra*, 515 U.S. at 828 (citing *Simon & Schuster, Inc. v. Member of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). Thus, the First Amendment is clearly violated in this case because access is being denied to a lucrative charitable campaign in order to "suppress the [allegedly anti-homosexual] point of view" of the Boy Scouts "on an otherwise includible subject" (i.e., sexual orientation). *Cornelius*, *supra*, 473 U.S. at 806. Accordingly, exclusion of the Boy Scouts from a state-created forum based on its unique viewpoint expressed through its leadership role-modeling policy is no more permissible than exclusion of a unique viewpoint (i.e., religious)

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the Campaign for approximately 30 years, including over 9 years after passage of the Connecticut Gay Rights Law; (2) prior to filing the Boy Scouts' complaint, no other charitable organizations were excluded from the 2000 Campaign for failure to comply with the non-discrimination policy (A. 1112-22); and (3) denial of Boy Scouts' participation within several months of the decision in *Dale v. Boy Scouts of America*, 160 N.J. 562, 734 A.2d 1196 (1999).

expressed through moral instruction. *Good News Club*, *supra*, 533 U.S. at 111.

Thus, this case is really not about discrimination against homosexuals at all, as the Committee believes, but *is about viewpoint discrimination against politically incorrect organizations* which engage in speech or other kinds of constitutionally-protected expressive conduct which is contrary to evolving notions of morally and politically correct behavior. What the State of Connecticut is really saying in this case is that it will not allow certain varieties of expression in its Campaign. But such a practice is the very *essence* of viewpoint discrimination. By disallowing discriminatory viewpoints in its fund-raising Campaign, *the state is actually practicing another form of discrimination – viewpoint discrimination – something which it is clearly forbidden to do* under this Court's jurisprudence. *See, e.g., Rosenberger*, *supra*, 515 U.S. at 828 ("[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys").

The constitutional principles at stake in *Wyman* are of no small moment because its holding has *negative implications for a broad variety of expressive associations*, including the important rights of gay and lesbian associations and other associations having a moral viewpoint. Based on the Second Circuit's reasoning, a gay rights organization could not limit its leadership positions to prominent gay activists without suffering financially. Furthermore, Catholic fraternal organizations, such as Opus Dei, which practice and advocate traditional celibacy could be subjected to potential fund-raising dilemmas, solely because of the uniform practice of their unique moral viewpoint. Other ecclesiastically-based organizations could also be

excluded from government-run charitable campaigns because they support limitations on ordination in their hierarchy to men, or non-homosexuals, or even to believers.[6]

Thus, the Second Circuit's holding in *Wyman* has vast negative implications for equality of expression and participation in state-sponsored fora by associations with unique moral viewpoints as expressed through their leadership and membership policies. Therefore, the Second Circuit's ruling requires review because it directly conflicts with this Court's First Amendment jurisprudence in the area of viewpoint discrimination.

III. THE SECOND CIRCUIT IN *WYMAN* HAS ERRONEOUSLY ATTEMPTED TO IMPOSE A WHOLLY NEW STANDARD OF REVIEW – CALLED VIEWPOINT DISPARITY – CONTRARY TO THIS COURT'S PRECEDENTS REGARDING VIEWPOINT DISCRIMINATION.

The Second Circuit's decision in *Wyman* also demands review because it attempts to erect a new lower-tier First Amendment standard of review – called viewpoint disparity – for viewpoints expressed through leadership role-modeling policies than for other forms of expression. The Second Circuit admits that Connecticut's Gay Rights Law

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[6] The Second Circuit's ruling that discriminatory expressive leadership policies deserve a lower-tier standard of review may directly lead to another anomaly: some Episcopalian-based organizations may be barred from participation in some government-sponsored fora, but not other Episcopalian groups, depending on whether they accept the ordination of gay bishops.

has a "differential adverse impact on attempts to voice anti-homosexual viewpoints through the medium of expressive association" that "will to some extent restrict the message." *Wyman*, *supra*, 335 F.3d at 93. However, the Second Circuit suggests that laws not targeting, but negatively impacting the message of, such expression merely constitute "viewpoint disparity" which does not deserve the same level of constitutional scrutiny as "purposeful" viewpoint discrimination. *Id.* at 93-94. However, the Second Circuit's attempt to carve out a new lower-level tier of First Amendment protection finds no justification in this Court's jurisprudence.

The prior cases of this Court have never justified laws that, either on their face or as applied, condone viewpoint discrimination, so that, as *Wyman* concedes here, the message of some viewpoints are restricted but others are not. Footnote 8 of the *Wyman* opinion is particularly revealing of the egregious form of viewpoint discrimination being rationalized by the Second Circuit in this case:

> "[A] law that has a predictably *adverse impact on certain viewpoints* may be cold comfort to those *whose expression the law, in practice, limits*. But that *is precisely the result that follows* from the Supreme Court's treating more restrictive measures, like those considered in *Dale*, differently from the lesser harm of removal from a nonpublic forum, like that at stake in the instant case." *Id.* at 95 n.8 (emphasis added).

However, the constitutional interest at stake in *Dale* was no different than the one here. Boy Scouts' right of expressive association as expressed through its leadership role modeling policies in *Dale* is the same right at stake in the present case. Moreover, contrary to the Second Circuit's suggestion above, there is no justification for a more

deferential standard of review for "viewpoint discrimination" analysis in cases involving a non-public forum as opposed to a public or limited public forum. The constitutional standard is the same in all such cases – *viewpoint discrimination is presumptively impermissible in any forum* when directed against speech otherwise permitted within the subject matter limitations of the forum. *Rosenberger, supra*, 515 U.S. at 830; *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983). Accordingly, the Second Circuit is improperly attempting to erect a new analysis in non-public forum cases, directly contrary to this Court's precedents.

Nor would it be desirable to establish a multiple-tier approach[7] to different expressive rights under the First Amendment merely because of the form in which they are communicated. Such an idea has been firmly rejected by this Court. "[T]he government may not prohibit expression simply because it disagrees with its message, [which] is not dependent on the particular mode in which one chooses to express an idea." *Texas v. Johnson, supra*, 491 U.S. at 416.

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[7] Attempts to devalue and categorize certain whole classes of recognized First Amendment expression (i.e., expressive conduct or expressive association) as less intrinsically valuable, and thereby less impervious to viewpoint discriminatory regulations, than other forms of expression, such as oral speech, leads to a dangerous and unpredictable slippery slope. By applying a lower standard of review for such forms of viewpoint discrimination, the Second Circuit has attached a new Orwellian twist to the First Amendment, implying that "some [First Amendment] animals are more equal than others." George Orwell, *Animal Farm* 133 (Signet Classic 1996) (1946).

Accordingly, the differential treatment of the Boy Scouts' viewpoint, as expressed through its expressive leadership policies, cannot be justified merely because the restriction sought to be imposed here – barring the Boy Scouts from participation in a non-public forum open to over 900 other private charitable organizations – is allegedly not as draconian as the outright prohibition of the leadership policies sought by the state in *Dale*.

Finally, allowing the Second Circuit's decision to stand is likely to further erode the rights of all expressive associations by permitting use, in an unintended manner, of anti-discrimination laws of general application to deny, on a non-neutral basis, forum participation by disfavored expressive assocations[8] in a large variety of contexts. This holds the potential for fundamentally eroding established First Amendment rights of such associations by lowering the constitutional scrutiny of viewpoint discriminatory efforts to economically weaken them. *Cornelius*, *supra*, 473 U.S. at 799 ("without the funds obtained from solicitation in various fora, the organization's continuing ability to

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[8] "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry Educ. Ass'n.*, *supra*, 460 U.S. at 62 (Brennan, J., dissenting). Thus, this Court's development of the First Amendment doctrine of "viewpoint neutrality" is one of the strongest bulwarks against attempts from historical factions across the ideological spectrum to shackle opponents by restraining attempts to speak, worship, associate, fund raise, or engage in numerous other expressive activities vital to a robust, open, and free pluralistic society. By contrast, limitations on some components of a group's First Amendment rights, such as the expressive activity and fund raising rights at stake in this case, dangerously lead away from a free and diverse society.

communicate its ideas and goals may be jeopardized"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (First Amendment is offended by giving "one side of a debatable public question an advantage in expressing its views"). Such an attempt to unlevel the ideological playing field is therefore a true threat to core First Amendment interests.

CONCLUSION

This amicus respectfully submits that this Court should overturn efforts from any part of the political spectrum to compel ideological orthodoxy or to punish ideological non-conformity, especially when it is directed against expressive associations. Far from vindicating the rights of homosexuals, a ruling which undermines the right of expressive association in this case may unwittingly lay the groundwork for denial of First Amendment rights of all citizens, including the First Amendment rights of homosexuals.

Granting certiorari in this case and reversing the ruling below will not lead to a general undermining of legal protections for gays and lesbians, contrary to some predictions three years ago when this Court issued its opinion in *Dale*. Hotels, restaurants, and other commercial establishments rarely, if ever, exist for an expressive purpose. Unlike Boy Scouts, the purpose of most commercial establishments is to make a profit, not a moral point. It simply strains credibility to suggest that most, or even many, businesses exist to teach their customers, clients, or membership the virtues of traditional family values. Therefore, upholding the right of expressive associations

in this case will not undermine the exercise of legitimate state efforts to protect the civil rights of minorities through application of anti-discrimination laws.

However, by refusing to grant the Petition in this case, the freedom of expressive associations holding unique viewpoints to exercise their constitutional rights and to compete on an equal, viewpoint-neutral basis for funding with other associations will be substantially chilled. Therefore, your amicus respectfully urges this Court to grant the Petition in this case in order to avoid erosion of important First Amendment rights of all expressive associations.

Respectfully submitted,

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